in the

Supreme Court

of the

United States

No. 79-319

DONALD ROUNDTREE,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, Donald Roundtree, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeal for the Fifth Circuit entered in this proceeding on June 6, 1979.

OPINION BELOW

The opinion of the Court of Appeals, Fifth Circuit, reported at __ F.2d__ (5th Cir. 1979), appears in the Appendix hereto, hereinafter referred to as "App."

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 6, 1979. Counsel received the opinion on July 10, 1979. This Court's jurisdiction is invoked under 28 USC, Rule 19, Supreme Court Rules, and 28 USC §1254.

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE ARRESTING OFFICER HAD REASONABLE SUSPICION TO STOP THE PETITIONER.

PROVISIONS INVOLVED

The pertinent portion of the Fourth Amendment to the United States Constitution is:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

STATEMENT OF THE CASE

The Petitioner was charged by indictment with:

1. Unlawful possession with intent to distribute a quantity of heroin hydrochloride.

The Petitioner filed a Motion To Suppress which was denied.

The Petitioner was tried non-jury. During trial, a renewed Motion To Suppress was denied and the Petitioner was found guilty as charged.

In an opinion issued June 6, 1979, the Fifth Circuit Court of Appeals affirmed the Petitioner's conviction (See, Appendix).

ARGUMENT

The search of the Petitioner was not conducted with his consent. The search of the Petitioner was not conducted because it was feared that he was a hi-jacker or that he possessed a weapon. The search of the Petitioner was conducted before he was placed under arrest.

The initial stop of the Petitioner, to be lawful, and to justify the admission into evidence of the substance subsequently found on his person, must have been based upon "specific and articulable facts which, taken together with the reasonable inference from those facts, reasonably warrant (the) intrusion, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The facts known to the arresting officer, at the time he intruded upon the Petitioner's liberties by stopping him, were:

1. The Petitioner deplaned in Atlanta from a flight from Los Angeles.

2. The Petitioner asked for information concerning a flight to Ft. Lauderdale, Florida.

3. The Petitioner limped and tried to avoid moving his right leg.

4. There was a bulge on the inside calf of the Petitioner's right leg.

From the time that the agent identified himself as a law enforcement officer and began to question the Petitioner, there was effected a stop which had to be based on reasonable suspicion of criminal activity, *United States v. Coleman*, 450 F. Supp. 433 (E.D. Mich. 1978).

The fact that the Petitioner deplaned from a Los Angeles flight and asked for information regarding a Fort Lauderdale flight means nothing. The Government argued these were crucial facts as both Los Angeles and Fort Lauderdale are both large heroin distribution areas. At the time the agent received this information, he had no reason to believe that the Petitioner was carrying heroin. Unfortunately, the narcotics problem in this country is such that any major or large city could be said to be an area where drugs are distributed. Therefore, to follow the Government's reasoning, deplaning from or traveling to any large area of population could be considered traveling to or from a "drug distribution area." Any airline passenger traveling between two large areas of population would, to the Government, be a potential "drug trafficker." The lower court considered the Petitioner's travel route to be suspicious because Los Angeles and Fort Lauderdale are "considered by the DEA to be narcotics distribution areas." It is submitted that if the DEA took a map of the United States and began labeling each narcotic distribution and use area, that most, if not all, of this nation's population centers would be included on that list. The subjective categorization by the DEA of "narcotics centers" is self-serving in that it seeks to justify intrusions on an individual's liberties, casts needless suspicion upon the travels of countless thousands of innocent citizens and, like a chameleon, seems to change itself to fit the facts of each case.

The only other information that the arresting officer possessed before stopping the Petitioner was that the Petitioner limped and had a bulge on his right calf which he stopped to adjust. A person may limp for a variety of reasons ranging from pain to physical disability to mere discomfort. The bulge could have been a brace or compress or bandage. The arresting officer testified to no medical training that would have enabled him to dismiss a medical explanation for the Petitioner's limp and bulge. The arresting officer did not know that the Petitioner had previously been shot, which could have accounted for the limp. The fact that the Petitioner glanced around him before adjusting the bulge is as consistent with a feeling of self consciousness because of a medical physical problem as with any other explanation.

The arresting officer "played a hunch." The Petitioner's travel arrangements and physical appearance were at least as indicative of innocent behavior and travel as of criminal activity. Law enforcement officers are by their nature suspicious. They are paid to be suspicious. If they are not suspicious, they do not remain in law enforcement for long. It is interesting to note that in this case, as in most, if not all, narcotics "stops", there is no testimony concerning how many innocent citizens are stopped, how many "bad guesses" are made. There is no evidence as to how often the subjective "guesses" of DEA agents based upon criteria which DEA itself formulated are correct "hunches" justifying intrusions upon citizens.

It is submitted that the facts known to the arresting officer at the time the Petitioner was stopped were least as susceptible to explanations denoting innocent behavior as to the criminal connotations the DEA officer subjectively chose to place on them. It is submitted that such facts did not, therefore, generate a "reasonable suspicion of criminal activity", that the stop of the Petitioner was illegal, and that the evidence subsequently found on him should have been suppressed.

See, *United States v. McCaleb,* 552 F.2d 717 (3th Cir. 1977); *United States v. Pope,* 561 F.2d 663 (6th Cir. 1967); *United States v. Floyd,* 418 F. Supp. 724 (E.D. Mich. 1976); *United States v. Rogers,* 436 F. Supp. 1 (E.D. Mich. 1976); *United States v. Westerborn-Martinez,* 435 F. Supp. 690 (E.D. N.Y. 1977); *United States v. Van Lewis,* 556 F.2d 385 (6th Cir. 1977).

The effect of the instant decision of the Fifth Circuit Court of Appeals in this case is to create an incon-

sistency among the federal courts as to what facts will support an airport investigative stop. The lower court's opinion denies the Petitioner his constitutional protection against Unreasonable Searches and Seizures.

CONCLUSION

The Petitioner herein was denied his Right To Be Free From Unreasonable Searches and Seizures guaranteed to him by the United States Constitution. The decision of the Court of Appeals, Fifth Circuit, is in conflict with that of other federal courts on the same point of law. Based upon the arguments and authorities cited herein, the Petitioners respectfully urge this Honorable Court to issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Donald ROUNDTREE,
Defendant-Appellant.

No. 78-5495.

United States Court of Appeals,
Fifth Circuit.

June 6, 1979.

Defendant was convicted in the United States District Court for the Northern District of Georgia, at Atlanta, Richard C. Freeman, J., of unlawful possession with intent to distribute a controlled substance, and he appealed. The Court of Appeals, Coleman, Circuit Judge, held that where experienced narcotics agent observed person in airport walking with unusual limp which appeared to be attempt to conceal an unusual bulge under the leg of his trousers, and observed person surreptitiously adjusting such bulge which clearly indicated an effort to conceal it, initial investigatory stop was bottomed on requisite quantum of reasonable suspicion, and sufficient grounds thereafter existed for seizing the bulge.

Affirmed.

1. Arrest — 63.5(4)

Initial investigative stop, in order to be lawful, must have been based on specific and articulable facts which, taken together with rational inference from those facts, rasonably warrant the intrusion.

2. Arrest — 63.5(5, 8)

Where experienced narcotics agent observed person in airport walking with unusual limp which appeared to be attempt to conceal an unusual bulge under the leg of his trousers, and observed person surreptitiously adjusting such bulge which clearly indicated an effort to conceal it, initial investigatory stop was bottomed on requisite quantum of reasonable suspicion, and sufficient grounds thereafter existed for seizing the bulge. U.S.C.A.Const. Amend. 4.

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, COLEMAN, and TJOFLAT, Circuit Judges.

COLEMAN, Circuit Judge.

Donald Roundtree appeals his conviction for unlawful possession with intent to distribute a controlled substance, heroin hydrochloride, in violation of 21 U.S.C. §841(a)(1). The sole issue raised on appeal is whether the trial court erred in denying Roundtree's motion to suppress.

I. *Facts*

On the afternoon of January 27, 1978, Drug Enforcement Agent Markonni was engaged in narcotics surveillance at Hartsfield International Airport, watching passengers deplaning from an incoming flight from Los Angeles. Los Angeles is considered by the DEA to be the most significant heroin distribution point in the nation. One of the passengers, Roundtree, was overheard asking for information concerning a flight to Fort Lauderdale which, according to the DEA, is a very large heroin use area.

Roundtree had an unusual limp which drew Agent Markonni's attention. It appeared that Roundree was attempting to avoid movement of his right leg rather than trying to avoid putting pressure on that leg. Agent Markonni also noticed a very obvious, large bulge on the right inside calf. He was confident that the bulge was not caused by a brace.

Roundtree took a seat in the gate area for the departing Fort Lauderdale flight. He looked behind him on both sides and then, through his trousers, adjusted the bulge.

Agent Markonni approached Roundtree and identified himself as a federal narcotics agent. In response to the agent's request for identification, Roundtree produced a Florida driver's license which was made out in his real name. Agent Markonni next asked to see Roundtree's plane ticket. The ticket was issued to "D. Carr". When asked about the discrepancy in names, Roundtree replied that he had obtained the ticket from a friend who worked for the airline and could purchase

tickets at a discount. Agent Markonni knew this to be false because the airlines employ a pass system or permit their employees to fly free.

Markonni also observed that Roundtree was not carrying any luggage and that no baggage claim checks were attached to the ticket. A claim check was later found in one of Roundtree's pockets during the search. It is of note that Agent Markonni was suspicious of Roundtree for other reasons which turned out to be groundless. He thought that the appellant's name, Donald Roundtree, was that of a known drug courier. Later on, he was unable to substantiate this vague recollection. The agent also noted in his written report that Roundtree's driver's license appeared to be different from other Florida drivers' licenses. Subsequently, this was determined not to be so.

Roundtree denied possessing drugs, but consented to a search. Upon arriving at a nearby office, Agent Markonni advised Roundtree that he had a right to refuse the search. Roundtree then withdrew his consent. Agent Markonni nonetheless took charge of the "bulge". It turned out to be a large brick, 9 inches by 4 inches by 2½ inches, which tested positive for the presence of an opiate. Roundtree was then arrested.

Upon indictment, Roundtree moved to suppress the evidence seized as a result of the warrantless search. The magistrate recommended that Roundtree's motion be denied, concluding that reasonable suspicion existed at the time of the initial investigatory stop; Agent Markonni's conduct during the course of the stop did not exceed the permissible scope; and probable cause existed at the time of the search and arrest. The District

Court adopted the magistrate's recommendation and, accordingly, denied the suppression motion.

Following a bench trial, Roundtree was found guilty as charged in the indictment and sentenced to the attorney general's custody for eight years, to be followed by a five year special mandatory parole term.

II.

The record amply establishes that Agent Markonni's conduct — during the initial investigatory stop and the subsequent arrest and search of Roundtree — was, when considered independently, well within the bounds of the Fourth Amendment. Actually, the only question is whether the *initial* investigatory stop[1] was bottomed on the requisite quantum of reasonable suspicion.

[1,2] Roundtree correctly argues that the initial investigative stop, in order to be lawful, must have been based on "specific and articulable facts which, taken together with rational inference from those facts, reasonably warrant [the] intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968).[2]

[1]The Government concedes that the initial investigatory stop, for purposes of the reasonable suspicion analysis, *infra*, occurred when Agent Markonni first approached Roundtree and asked for identification.

[2]The reasonable suspicion required for an investigative stop also has been formulated in terms of whether "a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry v. Ohio, supra*, 392 U.S. at 30, 88 S.Ct. at 1884; *Sibron v. New York*, 392 U.S. 40, 72, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) (Harlan, J., concurring in result).

See United States v. Michel, 5 Cir. 1979, 588 F.2d 986, 997-98, and cases cited therein; *United States v. Wright*, 5 Cir. 1979, 588 F.2d 189, 192; *United States v. Smith*, 6 Cir. 1978, 574 F.2d 882, 886; *United States v. Oates*, 2 Cir. 1977, 560 F.2d 45, 58-59.

Agent Markonni had more than the usual experience in the enforcement of federal drug laws. Roundtree walked with an unusual limp. The limp appeared to be an attempt to conceal the unusual bulge under the leg of his trousers, rather than an effort to compensate for some sort of an injury. Based on his experience, Agent Markonni knew that drug couriers often transport contraband strapped to their bodies. Roundtree's surreptitious conduct — looking over his shoulders and adjusting the "bulge" on his leg without lifting up his trousers — clearly indicated an effort to conceal the protrusion.

We agree that Agent Markonni had sufficient grounds for making the initial investigative stop and for seizing the bulge. *See United States v. Rieves*, 5 Cir. 1978, 584 F.2d 740, 744-45; *United States v. Smith*, 6 Cir. 1978, 574 F.2d 882, 883; *United States v. Oates*, 2 Cir. 1977, 560 F.2d 45, 59-61.[3]

AFFIRMED.

[3]In this connection see *United States v. Elmore*, which was argued in tandem with this case at Atlanta on the 12 day of February, 1979, 5 Cir., [slip opinion page 5083] __ F.2d__.

PART D. — OFFENSES AND PENALTIES

§841. Prohibited acts A — Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sen-

tence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for

an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1) (B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Pub.L. 91-513, Title II, §401, Oct. 27, 1970, 84 Stat. 1260.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing were this 24th day of August, 1979, mailed to Honorable Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and one copy to the Office of the United States Attorney, 428 U.S. Courthouse, 56 Forsyth Street, N.W., Atlanta, Georgia, 30303.

Paul Pollack

PAUL POLLACK